In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 557

RAILWAY EXPRESS AGENCY, INCORPORATED, APPELLANT,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, appellees Interstate Commerce Commission and the United States of America, move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment entered on June 6, 1957, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside an order of

[1] The opinion of the district court is now reported at 153 F. Supp. 738.

the Interstate Commerce Commission. The Commission's order granted the application of United Parcel Service, Inc. (United Parcel), for a certificate of public convenience and necessity pursuant to Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)) to perform restricted common carrier operations by motor vehicle over described irregular routes emanating from Chicago, Illinois (J. St. A 42–43). The order was predicated upon the finding that "present and future public convenience and necessity require operation by applicant [United Parcel], in interstate or foreign commerce, as a common carrier by motor vehicle * * *" (J. St. A 41). The Commission also found that the applicant "is fit, willing and able, properly to perform such service and to conform to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder" (J. St. A 41).

After completion of the administrative procedure, appellant sought relief from a three-judge statutory district court. The court in a comprehensive decision (one judge dissenting) sustained the Commission's report and order (J. St. A 1–6).

ARGUMENT

Section 207 (a) of the Interstate Commerce Act (J. St. 3–4) authorizes the Commission to grant certificates of public convenience and necessity to applicants desiring to perform transportation by motor vehicle in interstate commerce, provided the Commission finds that the applicant is fit, willing and able properly to perform the service proposed and to con-

form to the provisions of Part II of the Act and the Commission's requirements, rules and regulations thereunder, and that the proposed service, to the extent authorized, is or will be required by the present or future public convenience and necessity.

The Commission made these statutory findings, which are similar to those made by the Hearing Examiner (J. St. A 27–28).[2] The findings were based upon subsidiary findings (J. St. A 37) that:

> The record reveals that applicant's affiliates have developed a highly efficient system for the distribution of small parcels, and in order to render this type of service they have established rates on a level with the parcel post system. One of them is presently serving a large number of shippers in the Chicago area to the extent previously described, and parcels destined to points in the territory not served by this affiliate are in the main handled by mail.[3]

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[2] Since the Commission specifically adopted the facts as stated by the Examiner (J. St. A 34), his report (J. St. A 13–28) must be considered together with the report of the Commission (J. St. A 30–43).

[3] United Parcel sought a certificate of public convenience and necessity to serve a restricted segment of the shipping public. The application, as amended, was restricted so that:

"(a) *no service shall be rendered in the transportation of any package or article exceeding 50 pounds in weight or 108 inches in length and girth combined*, (b) each package or article shall be considered as a separate and distinct shipment and (c) no service shall be rendered in the transportation of such commodities as are sold by department stores and specialty shops between such stores and shops and their customers, or between such stores and shops and branches and warehouses thereof, or between such stores' or shops' branches and warehouses and such stores' and shops' customers" (J. St. A 33).

The type of business engaged in by the 41 shipper witnesses who supported the application (J. St. A 36) is indicative of the attractiveness of the proposed service.[4] The Commission pointed out that these shippers are engaged in producing and distributing clothes, precision tools, toys, abrasives, phonograph records, pharmaceutical supplies, plumbing supplies (J. St. A 36), "paper dress patterns" (J. St. A 20), and numerous other articles. The Examiner concluded that the record (J. St. A 25) "establishes an urgent need on the part of the shipping public for a small-package service such as that proposed and which is now effectively available only through the medium of the Parcel Post system."[5] Appellant does not challenge this

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[4] The Examiner's report (J. St. A 18) set forth the eight features of the proposed service which are considered more attractive than Parcel Post, with which the proposed service is designed to compete. These are:

"(1) scheduled daily pickups are made at the premises of the consignor, (2) dependable next-day delivery is made in the entire area served, (3) written proof of delivery is obtained in all instances from the consignee, (4) facilities are provided for the prompt tracing of shipments, even in response to telephone calls, (5) prompt settlement of loss and damage claims is made without burdensome 'red tape' and delays, (6) personal checks are accepted in payment of C. O. D. charges, (7) when initial delivery cannot be made, subsequent deliveries are attempted, and refused or undeliverable shipments are returned to the consignor without additional cost, and (8) free insurance is provided within certain limits."

[5] The Commission recognizes that one of the major transportation problems requiring solution is the growing traffic in small package shipments and the necessity of developing an economical and efficient means of handling such shipments. See 70th Annual Report of the Interstate Commerce Commission, 1956, pp. 5–7.

conclusion and it remains uncontroverted. Appellant's petition for reconsideration by the Commission recognized the attractiveness of the proposed service which appellant called "imaginative," "ingenious," and "bold."

Despite the clear findings, based upon a voluminous record, of a need for the proposed service, appellant challenges the action of the Commission, not on the uncontroverted need for the service, but on the tenuous ground that United Parcel failed to prove its ability to conduct the proposed operation "without the unlawful tariff device." With respect to the finding of United Parcel's ability, financially and otherwise, to perform the proposed service, the Commission and the examiner have spelled out the basis therefor in detailed subsidiary findings (J. St. 9–10, A 15–A 17, A 19, A 39).* Without challenging these findings, appellant attempts, by focusing attention on tariff and rate matters, to convert a case concerning the certification of a new operation into a case to determine the lawfulness of rates, charges and practices. This is contrary

* In addition to the multi-million dollar assets of United Parcel as composed of its affiliates (United Parcel of Ohio, the nominal applicant, has assets of about one-half million dollars), the examiner noted that as of October 31, 1955, United Parcel had a total of 513 specially designed and equipped small panelled cars in operation which would be used in the proposed service (J. St. A 17). The Examiner further found that based upon its past experience United Parcel would have no difficulty in meeting the volume requirements of the proposed operation. He found that at the time of the hearing "the wholesale operation in the Chicago area was making daily pickups from 1,300 consignors and handling approximately 15,000 packages a day" (J. St. A 19).

to appellant's position before the Commission, when it charged that the evidence of the shippers supporting the application could not be considered since they were motivated by a desire for lower rates rather than a need for the service.[7] This is in accord with the Commission's long established practice, namely, that the Commission will not consider rates as pertinent in proceedings for operating authority since other sections of the act provide an adequate remedy pursuant to which their lawfulness can be tested.[8] *Wellspeak Common Carrier Application*, 1 M. C. C. 712; *Youngblood Extension of Operations—Canton, N. C.*, 3 M. C. C. 193; *Johnson Common Carrier Application*, 18 M. C. C. 194; *Omaha & C. B. Ry. & Bridge Co. Common Carrier Application*, 52 M. C. C. 207, 235; *Black Extension of Operations—Prefabricated Houses*, 48 M. C. C. 695, 709; *Pomprowitz Extension—Packing House Products*, 51 M. C. C. 343, 350.

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[7] The Commission disagreed with this contention (J. St. A 37). Likewise, the court below held:

"But the Commission did not base its finding of convenience and necessity on the specific rate structure proposed by the applicant. On the contrary it found that neither plaintiff nor other carriers were meeting, or were fit, able and willing to meet, the shippers' needs for the particular service proposed by the applicant, and it expressly rejected the protestants' argument that the public witnesses favored the application out of a desire for lower rates" (J. St. A 6).

[8] In some instances, the Commission considers the evidence of rate stops and minimum charges, as in the instant case, as a significant factor indicating a lack of interest by competing carriers to provide a type of service shippers need and applicants propose to furnish. *Malone Freight Lines, Inc., Extension—Textiles*, 61 M. C. C. 501, sustained by a three-judge statutory court in *Atlanta-New Orleans Motor Freight Co., et al.* v. *United States, et al.*, 10 Fed. Carr. Cas. 2085 (1953).

We submit that appellant is inconsistent when it condemns as irrelevant to a case involving certification of new operations the shippers' testimony as based upon rate considerations, but urges that the Commission must consider in the certificate proceeding the rate practices of United Parcel, even before the Commission had determined that a need existed for the service and before United Parcel could file a tariff in compliance with the tariff publishing terms of Section 217 of the Act, 49 U. S. C. Section 317. The Examiner pointed out that appellant's attack on the rate practices of United Parcel was premature (J. St. A 24–A 25). The Commission, following its long established practice, declined to consider the tariff matter in the certificate proceeding and in so doing, stated (J. St. A 38–A 39):

> If applicant is granted authority, it will be required to comply with all applicable rules and regulations of the Commission and will not be permitted to engage in practices which are incompatible with its status as a common carrier. Applicant has evinced a willingness to comply strictly with such rules and regulations and to consult with our staff in preparing its initial tariff. We are not convinced that it cannot operate in conformity with our requirements affecting motor common carriage and still render an efficient service responsive to the public need.

The court below also recognized the inconsistent position taken by applicant. It said (J. St. A 4):

> While conceding that ordinarily rates are not a relevant factor in certificate proceedings, the

> plaintiff argues that the Commission's action in refusing to consider the validity of the $2.00 per week charge "was arbitrary and capricious and therefore the orders of the Commission should be set aside." We see nothing arbitrary in the Commission's action.

In support of this conclusion the court below relied upon this Court's opinion in *American Trucking Associations* v. *United States*, 326 U. S. 77, where, in sustaining the holding of the district court that the allegedly discretionary features of the applicant's rates were not properly in issue in a certificate proceeding, the Court stated (pp. 86–87):

> It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of § 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of § 220 of the same part to which the other motor carriers are subject. *These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.* [Emphasis added.]

The Court further pointed out that Section 204 (c) of the Act provides a method of objection to improper practices, such as unreasonable tariffs or irregular accounting, by motor carriers.*

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* Section 204 (c) provides:

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant

After the Commission had denied appellant's final petition for reconsideration (J. St. A 44), United Parcel filed its tariff pursuant to the Commission's instructions (J. St. A 41) to become effective April 1, 1957. If appellant believes that the rate practices of United Parcel are unlawful, appellant may, as the court below said (J. St. A 4–A 5) obtain any relief to which it is entitled by filing a complaint with the Commission pursuant to Section 216 (e) of the Act, 49 U. S. C. Sec. 316 (e).[10] Thus, not only did appellant fail to exhaust its administrative remedy (*Director General of Railroads, et al.* v. *The Viscose Company*, 254 U. S. 498, 502–503), but it has failed to follow the prescribed administrative procedure for challenging rate practices (*Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752). Consequently, the case comes down to the question of whether or not the Commission properly determined the public convenience and necessity, a matter delegated by Congress to the administrative discretion of the Commission.

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thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

[10] Section 216 (e) provides, in part:

"Any person * * * may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title. * * *."

Interstate Commerce Commission v. *Parker,* 326 U. S. 60, 65. The district court, in holding the Commission's action proper, said (J. St. A 6):

> * * * We think it apparent from the reports of the examiner and Division I that the certificate was granted to United Parcel on the basis of evidence showing a more efficient service, at a lower cost and of a type not presently offered to shippers.

Thus, we submit that the appeal does not raise any special or unusual circumstances which warrant a recanvassing of the record by this Court. *New England Divisions Case,* 261 U. S. 184, 203, 204; *Radio Corp.* v. *United States,* 341 U. S. 412, 415.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted.

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